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Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

MICHAEL TIMOTHY JACKSON,

Petitioner

versus

STATE OF MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the Michigan Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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SRP

QUESTIONS PRESENTED FOR REVIEW

I. DID THE MICHIGAN SUPREME COURT ERR IN FINDING THAT THE TAINT OF A COERCED CONSENT TO ENTER A HOUSE AT 3 AM AND THE IMMEDIATELY FOLLOWING ILLEGAL INVESTIGATORY ARREST OF A CHILD WAS PURGED MERELY BECAUSE THE POLICE SUBSEQUENTLY GAVE MIRANDA WARNINGS TO THE CHILD AND HIS FATHER AND BECAUSE THE POLICE FAILURE TO HAVE THE CHILD IMMEDIATELY ARRAIGNED, AS REQUIRED BY LAW, WAS NOT A PRODUCT OF BAD FAITH?

II. DOES COUNSEL'S INEFFECTIVENESS IN FAILING TO RAISE THE MANIFEST VIOLATION OF MR. JACKSON'S FOURTH AMENDMENT RIGHTS EITHER IN THE TRIAL COURT OR IN THE APPEAL AS OF RIGHT GOOD CAUSE FOR MR. JACKSON'S FAILURE TO RAISE THIS ISSUE IN A TIMELY MANNER?

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OPINIONS BELOW

The trial court unpublished opinion denying Petitioner's Motion for New Trial relative to his federal claim under the Fourth Amendment was entered on August 12, 1998 (App, 1). The Michigan Court of Appeals unpublished order denying Petitioner's Application for Leave to Appeal was entered on July 18, 2000 (App, 2). The Michigan Supreme Court's opinion denying Petitioner's Application for Leave to Appeal was entered on September 25, 2001 and is published at 465 Mich 390; __NW2d__ (2001)(App, 3). The Michigan Supreme Court's order denying a timely motion for rehearing was entered on November 8, 2001 and is published at 465 Mich 1209 (2001)(App, 4).

STATEMENT OF JURISDICTION

Petitioner seeks review under 28 USC 1257 of the judgment entered by the Michigan Supreme Court on September 25, 2001. That court denied a timely motion for rehearing on November 8, 2001.

CONSTITUTIONAL PROVISION INVOLVED

This Petition involves US Const, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Petitioner was sixteen years old when he was arrested for murdering the daughter of his father's girl friend. Following a hearing, the probate court waived jurisdiction to adult court. On April 18, 1985, the Saginaw County Circuit Court convicted Petitioner at a bench trial of First Degree Murder. On May 30, 1985, Petitioner was sentenced to life imprisonment without parole. The Michigan Court of Appeals rejected his appeal as of right. *People v Jackson*, 171 Mich App 191; 429 NW2d 849 (1988). (App, 5) The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal on August 23, 1989. 432 Mich 896 (1989). The same attorney represented Petition in the trial court and throughout the appeal as of right.

On July 9, 1998, Petitioner filed in the trial court a Motion for Relief from Judgment under Michigan Court Rules 6.500 et seq., in which he argued that the police violated his Fourth Amendment rights by coercing his consent to enter his house and also by seizing him without probable cause, that the confession and consent to search that he gave the police one hour later were the fruits of this illegal conduct.

Petitioner's Motion specifically argued in Headnote VII that ineffective assistance of counsel excused petitioner's failure to raise this issue at trial or on appeal. Petitioner also claimed that the waiver from juvenile court violated Michigan law, a claim that is not part of the instant Petition.

The trial court's opinion of August 12, 1998, held that Petitioner was illegally arrested but that the taint of this illegality was purged and it was therefore unnecessary to reach the issue of ineffective assistance of counsel.

> While it is true that only a short time elapsed between defendant's seizure and statement, he was, during that period, twice advised of his

Miranda rights. Nor does the Court find the police conduct in this case particularly flagrant or of such character as to justify the remedy sought. It is undeniable the police lacked probable cause to arrest defendant at his residence. They did, however, clearly have a right and need to question him about his presence at the victim's home and any knowledge he may have had of the killing. In this regard, the entire purpose of taking him into custody was not to place him under arrest, but to hold him until he could properly be questioned in the presence of his father. Although there apparently was a failure to comply with all appropriate procedures governing questioning of a minor, the officers were at least aware that different procedures and rules applied and did their best to comply with them. There is nothing in this case to suggest that their actions were part of some illegal plan or scheme or product of improper motivation. As noted above, no attempt was made to question defendant until his father was present. Mr. Jackson was contacted as soon as possible, arriving at the post a short time after his son. Both of them were given *Miranda* warnings and the defendant made his statement. As noted by the Court of Appeals [in the appeal as of right], there is nothing in the record to suggest that the father was not fully able to exercise his free will and protect the rights and interests of his son. Under the circumstances, the Court finds that any taint of initial police misconduct was sufficiently purged and the statement admissible under the Fourth Amendment. It follows that any neglect of trial or appellate counsel in failing to raise this issue was of no consequence. For the same reasons, it also follows that any consent obtained from the defendant and his father to search the premises in

question was voluntary and otherwise proper, and that any evidence seized as the result of that consensual search was properly admitted at trial. (App, 1, 4-5)

The trial court issued a second opinion on May 28, 1999, finding no violation of Michigan law regarding the waiver from juvenile court. On July 18, 2000, the Michigan Court of Appeals denied Petitioner's Application for Leave to Appeal on both issues. (App, 2) On September 25, 2001, the Michigan Supreme Court issued a published opinion, 465 Mich 390; __NW2d__ (2001)(App, 3). The opinion quoted verbatim the above passage from the trial court's opinion. After discussing procedural issues that are not part of this Petition[1], the Supreme Court concluded:

> As noted earlier, the circuit judge carefully reviewed and discussed the merits of these claims, finding them without merit. This, in effect, amounts to a determination that defendant failed to establish the prejudice aspect of the MCR 6.508(D)(3) standard. That made it unnecessary for the court to address the good cause question. See *Reed, supra* at 400-401. We find no error in the judge's analysis of the prejudice question and therefore affirm.

On November 8, 2001, the supreme court denied a timely motion for rehearing. (App, 4)

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[1] The court held the cause requirements of MCR 6.500 applied to Petitioner's claims even though the appeal as of right concluded before MCR 6.500 was enacted. However, the court noted that it was unnecessary to apply these cause requirements since the trial court had reached the merits of the instant claim and concluded that Petitioner was not prejudiced because the issues were meritless.

On March 25 and 29, 1985, the trial court held a pretrial hearing as to the voluntariness of Petitioner's inculpatory statement. Although the validity of the arrest was not challenged, the testimony at that hearing and the trial established that the police investigated the crime scene on the evening of December 13, 1983 and arrived, without a warrant, at Petitioner's house trailer at 2:45 AM on December 14. 3/29/85, 8. Petitioner was 16. His father was not home. *Id.*, 11. Michigan State Police Lieutenant James Malczewski admitted he only knew at that time that Petitioner had been at the crime scene sometime before the homicide occurred and that he "had no idea" whether Petitioner was actually involved in the crime. *Id.*, 7. After telling Petitioner he was taking him downtown for questioning, Malczewski accompanied him into his bedroom. Asked why, Malczewski testified, "Well, not knowing if he was the individual we were looking for, the right one, or if he was a suspect, I did not want to leave him alone. *Id.*, 15.

Michigan State Police Detective Sergeant Richard Harms admitted at trial, "It seems to me there came a point in time ... we took Michael into custody, and it seems to me that we removed him from the home." I, 82-83, and that "we took him into custody." Id., 82, 84. Malczewski similarly admitted that, "Mr. Jackson was told that he was going to go with us to the post while we attempted to locate his father before anything else was done." 3/29/85, 15. Malczewski repeated this admission at trial, "After the information I had obtained [that Petitioner knew the deceased], I think we – I told Michael Jackson we were going to hold him until we could contact his parents." I, 100. Petitioner added, "Then they read me my rights and put the handcuffs on me and took me out to the car." 3/25/85, 22

The prosecutor noted a lack of probable cause. 3/26/95, 97: "What we have is Office Malczewski going to a trailer of a party known to have been at the homicide

scene. ... Other than that, that's the only facts available to Officer Malczewski. He did not know whether or not Michael was a suspect at that point in time."

Petitioner testified at the Fifth Amendment hearing that the police did not ask his permission to enter when they woke him up by knocking on his door at 2:45 AM. Rather, three officers, one in uniform, shined a flashlight in his eyes, 3/25/95, 9. After Petitioner identified himself, the police ordered him to back away from the door and they then entered his house. *Id.*, 10. Malczewski and Harms testified they asked and received permission from Petitioner. The trial court resolved this swearing contest in favor of the police.

The police and Petitioner arrived back at the station at 3:30 AM. 3/29/85, 16. At the station, Malczewski "took him [Petitioner] upstairs into my office. I left Detective Harms with him." *Id.* Asked why Petitioner was being held at that time prior to the statement Harms replied, "for having murdered Miss Smith." *Id.*, 88. Harms later described Petitioner as "the alleged perpetrator". *Id.*, 90. Petitioner's father was contacted fifteen minutes later. *Id.*, 16. After the father and juvenile Petitioner received Miranda warnings, Petitioner gave a statement and consent to search the trailer at 4:15 AM, forty-five minutes after he arrived at the station in handcuffs. *Id.*, 23. The police immediately searched his house.

The State relied heavily at trial on the confession and evidence seized during this search. Shoes, jeans and a jacket taken from Petitioner's room were admitted, and an expert testified that they all contained blood that matched the victim's. Trial, I, 37-74. The prosecutor repeatedly noted in closing argument that the confession established premeditation. V, 6-10, 18-20, 49-54 The trial court specifically asked for copy of the statement prior to deliberating, V, 55, and then relied on facts taken exclusively from the statement to find premeditation: "The Court will say that premeditation primarily is shown by

the actions of the defendant ... the Defendant readied himself with the weapon prior to going to the house, that he parked his automobile away from the house, that he waited for the victim to get off the telephone." V, 57

ARGUMENT

I. THE MICHIGAN SUPREME COURT ERRED IN FINDING THAT THE TAINT OF A COERCED CONSENT TO ENTER A HOUSE AT 3 AM AND THE IMMEDIATELY FOLLOWING ILLEGAL INVESTIGATORY ARREST OF A CHILD WAS PURGED MERELY BECAUSE THE POLICE SUBSEQUENTLY GAVE MIRANDA WARNINGS TO THE CHILD AND HIS FATHER AND BECAUSE THE POLICE FAILURE TO HAVE THE CHILD IMMEDIATELY ARRAIGNED, AS REQUIRED BY LAW, WAS NOT A PRODUCT OF BAD FAITH.

This case has a settled factual record. The police, knowing they lacked probable cause, took a parentless, sleepless 16 year old out of his house in handcuffs at 3 AM in the morning because they wanted to question him. The police failed to take the child before a magistrate for immediate arraignment, as required by Michigan law. Instead, they took him to the police station, where they held him under constant surveillance in a detective's room. After locating a parent in the middle of the night and bringing him into the room, the police gave Miranda warnings to both the father and child and, at 4:15 AM, obtained a confession and consent to search.

The trial court acknowledged, "It is undeniable the police lacked probable cause to arrest defendant at his residence," but found that the Fourth Amendment taint was purged because 1) the police had a "right" and a "need" to question Michael and seized him only to

accomplish that end; 2) there were no Fifth or Fourteenth Amendment violations; and 3) the police did not operate in bad faith or have any illegal purpose. The Michigan Supreme Court adopted these findings, in a published opinion.

It is hard to imagine a more flagrant violation of the Fourth Amendment than a middle of the night seizure of a minor child in his house, without any parent present, where the police subjectively know they lack probable cause. The arrest was also flagrantly purposeful. Their desire to interrogate this child at once was the very force that drove these officers to disregard the repeated edicts of this Court that such investigatory motives do not meet Fourth Amendment demands. Either this Court affirms that such conduct must be deterred or the published Michigan Supreme Court holding that police, knowing they do not have probable cause, can seize for questioning a juvenile at any time and any place, enters the jurisprudence of the fruit of the poisonous tree doctrine. Petitioner respectfully suggests that the choice is clear.

It is well established that the tainted fruits of illegal Fourth Amendment activity will be excluded at trial. *Wong Sun v United States*, 371 US 471, 488; 83 S Ct 407; 9 L Ed 2d 441 (1963). *Brown v Illinois*, 422 US 590, 603-04; 95 S Ct 2254; 45 L Ed 2d 416 (1975), noted the relevant factors in determining whether the evidence must be excluded:

> The *Miranda* [v *Arizona*, 384 US 436; 86 SCt; 16 LEd2d 694 (1966)] warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But there are other factors to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see, *Johnson v Louisiana*, 406 U.S. 356, 365; 92 SCt 1620, 1626; 32 L.Ed.2d 152 (1972), and, particularly, the purpose and flagrancy of the

official misconduct are all relevant. See *Wong Sun v United States*, 371 US, at 491; 83 SCt at 419. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.

Brown at 602 emphasized that subsequent police compliance with *Miranda* is far from dispositive in analyzing whether the Fourth Amendment illegality must be deterred:

> If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted [cites omitted]. Arrests made ... for questioning or 'investigation' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'

This principle was forcefully restated in *Taylor v Alabama*, 457 US 687, 690; 102 S Ct 2664; 73 L Ed 2d 314 (1982), which held that the defendant's confession was the fruit of an illegal arrest even though he received three *Miranda* warnings prior to confessing:

> In *Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be 'voluntary' for purposes of the Fifth Amendment, in the sense that Miranda warnings were given and

> understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of 'voluntariness' for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. The reason for this approach is clear: "[t]he exclusionary rule, ... when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth Amendment." If Miranda warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere 'form of words.'

The same analysis applies to consents to search that, even if voluntary, are tainted by a preceding illegal arrest. Thus, in *Florida v Royer*, 460 US 491; 103 SCt 1319; 75 LEd2d 229 (1983), where the police illegally took a suspected drug courier into a small room in an airport for the express purpose of obtaining his consent and shortly thereafter he did give them permission to search his luggage, this Court found that the voluntary consent was tainted by the illegal arrest. *United States v Melendez-Garcia*, 28 F.3d 1046, 1054 (10th Cir. 1994), held: "[N]ot only must the government show that consent is voluntary in fact, but it must also demonstrate a break in the causal connection between the illegality and the consent, so that the court will be satisfied that the consent was 'sufficiently an act of free will to purge the primary taint.'" (Quoting *Wong Sun*, at 486). *United States v Morgan*, 725 F.2d 56, 58 (7th Cir. 1984) held that "inquiry does not end with a determination that [the] consent was voluntary, for if the agents had improperly 'seized' the defendant[s], [their] consent to a search would have been tainted and the evidence should have been suppressed.)". *Commonwealth v Freeman*, 757 A2d 903 (Penn., 2000), suppressed the evidence because the State

was unable to show that a voluntary consent was anything other than the product of an illegal detention. *Royer, Morgan* and *Melendez-Garcia* and *Freeman* all illustrate the controlling principle of law, that the voluntariness of Petitioner's consent to search, like the voluntariness of his confession, is not dispositive for fruit of the poisonous tree analysis.

The caselaw is clear, then, that the police did not save themselves from the consequences of their illegal arrest merely because they consequently complied with other constitutional requirements. Yet, the lower courts' analysis focused almost exclusively on the facts that Petitioner and his father were given *Miranda* warnings and that the ensuing confession and consent were voluntary. These courts clearly misinterpreted Fourth Amendment law by placing such significant weight on these factors. By doing so, they "eviscerated" the Fourth Amendment to a "form of words."

The courts also ignored that this case involved an obvious investigatory arrest and that at least three decisions of this Court emphasized that such arrests as prime examples of flagrant and purposeful misconduct that must be deterred even if *Miranda* warnings are given.

In a passage that fits the instant case like a glove, this Court noted in *Brown*, 422 at 605:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious. Awareness of this fact was virtually conceded by the two detectives when they repeatedly testified, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning' [cite omitted]. The arrest, both in design and execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected

gives the appearance of having been calculated to cause surprise, fright and confusion.

Here too the illegality had a quality of purposefulness and here too the two detectives virtually conceded their arrest was for questioning. They and the prosecutor emphasized this fact at the Fifth Amendment hearing. The trial court therefore acknowledged, "It is undeniable the police lacked probable cause to arrest defendant at his residence." Moreover, the manner of their actions was even more calculated to cause confusion and fright since it was a child they arrested, in his home, at 3 AM. *Brown*, then, directly condemned the police conduct in this case.

In *Dunaway* v *New York*, 442 US 200, 218; 99 S Ct 2248; 60 L Ed 2d 824 (1979), this Court noted that the arrest was "virtually a replica of the situation in *Brown*. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance." In suppressing the confession resulting from this investigatory arrest, this Court observed:

> Where there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts. *Id.*, 218.

Three years later, this Court concluded in *Taylor* that the violation was:

> [a] virtual replica of both *Brown* and *Dunaway*. Once again, the police effectuated an investigatory arrest without probable cause ... and involuntarily transported petitioner to the station for interrogation in the hope that something would

> turn up. The fact ... that the confession they obtained may have been 'voluntary' for purposes of the Fifth Amendment does not cure the illegality of the arrest. 457 US 690-91.

Yet, only one year after *Taylor* forcefully affirmed *Brown* and *Dunaway*, the instant police engaged in yet another "virtual replica" of this thrice prohibited conduct. The police affirmatively knew they lacked probable cause when the seized Petitioner. Nevertheless, and in complete disregard of the increasingly firm language of this Court, the police effected an investigatory arrest and involuntarily transported Petitioner to the station for interrogation in the hope that something would turn up, the very conduct explicitly condemned in the three decisions of this Court.

The Michigan courts sought to excuse this patent illegality by noting that Petitioner was *Mirandized*. Again, all three of these Court's decisions found that this fact did not excuse the investigatory arrest. The Michigan courts also tried to minimize the obviously illegal arrest by observing that the police "did, however, have a right and need to question him about his presence at the victim's home." This reasoning flies directly in the face of *Taylor*, *Brown* and *Dunaway*, all of which held that the police do not have a "right" to question a suspect in the absence of probable cause. It is shocking to contemplate that a state supreme court in 2001 published an opinion finding that the police have a "right" to question and that this "right" can mitigate an investigatory arrest.

The courts further justified their rationale by noting, "The entire purpose of taking him [Petitioner] into custody was not to place him under arrest, but to hold him until he could be properly questioned in the presence of his father." This distinction is meaningless. Whether characterized as a "hold" or an "arrest," Petitioner was clearly "seized" for Fourth Amendment purposes.

Moreover, the *Dunaway, Brown, Taylor* trilogy made explicitly clear that the police do not have a "right" to "hold" someone for interrogation, even if that eventual interrogation, standing alone, is proper questioning.

Nor was the investigatory arrest of Petitioner excused by the fact the police could not, under Michigan law, interrogate him immediately in the absence of a parent. There was an obvious legal recourse available to these police: first find a parent and then reapproach the child. Alternatively, the police could have asked Petitioner permission to remain in his house while they attempted to reach his father. Instead, they removed him from the comfort of his house and to police headquarters. As a direct result of this conduct, the parent did not unite with his child in the familiar environment of his own home but in the inherently coercive environment of a police station in the middle of the night.

The lower courts' reasoning that a police station "hold" of a child is justifiable whenever the parent is absent actually affords juveniles less protection than adults because it permits police to seize any child, anywhere, at any time, and then go look for a parent. Thus, the courts' analysis turns on its head the jurisprudential principle that children are entitled to greater protection.

Another substantial element of the flagrant conduct herein is that the police had no right to even enter Petitioner's home. Petitioner's Motion for Relief from Judgment specifically claimed that, even assuming that Petitioner gave the police permission to enter his house, as the trial court had found at the Fifth Amendment hearing, this facially valid consent was involuntary and violative of the Fourth Amendment because of the coercive atmosphere intentionally created by the police when they knocked on his door in the middle of the night. Neither the trial court nor the Michigan Supreme Court reached this issue, or even mentioned it as a relevant factor under *Brown*.

As noted in the Motion for Relief from Judgment, this Court held in *Schneckloth v Bustamonte*, 412 US 218, 247; 93 S Ct 2041; 36 L Ed 2d 854 (1973), that a more rigorous inquiry is required when the police obtain consent in inherently coercive situations: "Absent evidence of inherently coercive tactics, either from the nature of police questioning or conduct, or the environment and atmosphere in which events occur, traditional tests for determining voluntariness of consent will apply." Many jurisdictions have found that police intrusion into the home in the middle of the night is so "inherently coercive" as to vitiate the voluntariness of apparent consent. *United States v Jerez*; 108 F 3d 684 (7th Cir, 1997), summarized the caselaw:

> Our jurisprudence interpreting the Fourth Amendment has long recognized that police encounters at a person's dwelling in the middle of the night are especially intrusive. Indeed, the special vulnerability of the individual awakened at the privacy of his place of repose during the nighttime hours to face a nocturnal confrontation with the police was recognized in the common law that antedates our separation from England. [cites omitted]
>
> Because our law and legal traditions long have recognized the special vulnerability of those awakened in the night by a police intrusion at their dwelling place, our Fourth Amendment jurisprudence counsels that, when a knock at the door comes in the dead of night, the nature and effect of the intrusion into the privacy of the dwelling place must be examined with the greatest of caution. Therefore, in recognizing the particular intrusiveness of nocturnal encounters with the police at one's dwelling, the courts of appeals have stressed the impact of such encounters on the

> individual dwelling there. For instance, our colleagues in the First Circuit have noted specifically that the reason for limiting nocturnal searches is to prevent "abrupt intrusions on sleeping residents in the dark." *United States v Young*, 877 F.2d 1099, 1104 (1st Cir. 1989) (Breyer, J., now Supreme Court Justice). Likewise, the Second Circuit has noted the "peculiar abrasiveness" of intrusions by law enforcement officials at night. *United States v Ravich*, 421 F.2d 1196, 1201 (2d. Cir.), cert. denied, 400 U.S. 834 (1970). And the Tenth Circuit, in *Harless v Turner*, 456 F.2d 1337, 1338-39 (10th Cir. 1972) (citing *Villano v United States*, 310 F.2d 680, 684 (10th Cir. 1962); *United States v Page*, 302 F.2d 81 (9th Cir. 1962)), invalidated an individual's consent to search because it was obtained after the individual was routed out of bed in the middle of the night.

Here, too, Petitioner "was routed out of bed in the middle of the night" to find police knocking on his door and seeking entry. Even more egregious, it was a minor child that the police intentionally subjected to their inherently coercive "middle of the night" tactics. As noted in *Bustamonte, supra*, 412 US at 226, age is a relevant factor in assessing consent. At least two courts have found that a dead of night confrontation with a minor invalidated his apparent consent to enter the home. *People v Smith*, 19 Mich App 359; 172 NW2d 902 (1969); *People v Jennings*, 298 P2d 56; 142 Cal App 2d 160 (1956).

It seems clear, then, that the police coerced Petitioner's consent when they confronted him in the middle of the night. Even if this Court determines that the consent to enter was valid, the circumstance of this "peculiar abrasiveness" is a factor to be considered in assessing whether the immediately ensuing illegal arrest tainted the confession.

Another relevant consideration is that Petitioner was detained first in a police car and then under constant surveillance in a room at a police station. Detention at a police station is certain "to cause surprise, fright and confusion." *Brown, supra.* For example, *MaCall v People,* 623 P2d 397, 401 (Colo, 1982), suppressed the confession where the defendant was arrested in his home and "spirited away ... unbeknown to his mother or father, " Compare, *Rawlings v Kentucky,* 448 US 98; 100 SCt 2556; 65 LEd2d 633 (1980), where this Court found that the taint was purged in large measure because the detention was at the suspect's house. The lower courts placed great weight on their conclusion that there was nothing to suggest that the father could not exercise his free will, yet he was immersed in the same coercive environment when he was called to the police station at 4 AM to find his son detained, illegally, in a detective's room. If the police had obeyed the Fourth Amendment, the interview with the son and father would have occurred in their home.

Another significant circumstance is that Petitioner's statement and consent were obtained within seventy-five minutes of his arrest. That is, the police took him from his house at approximately 3 AM and he gave his statement at 4:15 AM. Even the Michigan courts conceded this short passage of time. As noted, in *Brown,* this "temporal proximity of the arrest and the confession is a significant factor."

In sum, the exacerbating circumstances of this case include that the police intentionally created an inherently coercive atmosphere by knocking on the front door or a residence at 3 AM in the morning, and they immediately thereafter made an illegal investigatory arrest of a sixteen year old child, in his own home but with no parent by his side, even though the police had actual knowledge that they did not have probable cause. They then kept him in a coercive environment until he confessed one hour later. Given the age of the defendant and the time of the event,

the police conduct in this case is substantially more egregious than the conduct condemned in the above trilogy.

Nor were there any significant intervening circumstances. Again, the Michigan courts relied on the fact that Petitioner and his father were *Mirandized* and that Petitioner gave a voluntary statement and consent to search. Yet, this Court has made emphatically clear that these are far from dispositive factors.

Truly significant intervening circumstances can include arraignment before a judicial officer, *Johnson v Louisiana*, 406 US 356, 365; 92 SCt 1620; 32 LEd2d 152 (1972), an arraignment plus a six-day release from custody, *Wong Sun*, 371 US at 491; and issuance of an independently obtained search warrant that leads to discovery of drugs and a spontaneous admission, *Rawlings*, 448 US at 108-09 (1980).

Here, Petitioner was not only not arraigned but the police violated their duty under Michigan Juvenile Court Rule 1969, 3.3, to advise Petitioner of his right to be taken immediately to a juvenile court facility and to have a youth officer present during the questioning. Thus, the police failed their duty to involve a neutral officer of the court. Similarly, the police had the duty under MCL 764.27 to take Petitioner "immediately" to juvenile court. Their failure to follow the protective juvenile laws eliminated what would have been a truly significant intervening event.

The lower courts dismissed this failure because the police may have acted in good faith:

> Although there apparently was a failure to comply with all appropriate procedures governing questioning of a minor, the officers were at least aware that different procedures and rules applied and did their best to comply with them. There is nothing in this case to suggest that their actions

were part of some illegal plan or scheme or product of improper motivation.

This analysis, that the absence of intervening circumstances was excused because there was no "improper motivation," is totally misplaced. This Court has already rejected a similar argument: "To date, we have not recognized such an exception [that the police acted in good faith], and we decline to do so here." *Taylor*, 457 US 693. Therefore, Petitioner does not have to show "improper motivation" nor are the police omissions excused by good faith. The fact remains that the police, intentionally or inadvertently, added to their initial and flagrant illegal arrest by failing to comply with either JCR 3.3 or MCL 764.37. These failures removed the last possibility of a truly significant intervening circumstance that could have broken the causal link between the arrest and the evidence that was obtained shortly thereafter. Accordingly, the lower courts erred, both when they excused the omissions as unintentional and when they failed to acknowledge that the omissions, intentional or not, were another link in the causal chain.

In sum, the Michigan Supreme Court has held that Fourth Amendment decisions of this Court give the police the right to immediately question a child who they think may have some knowledge of a crime and, to effect that right, the police may, without a warrant or probable cause, forcibly remove the child from his house at 3 AM and keep him under surveillance at a police station until the child's parent is located and brought to the child, so long as the police do not otherwise violate the child's Fifth of Fourteen Amendment rights and do otherwise manifest bad faith.. This published state supreme court opinion conflicts with relevant Fourth Amendment decisions of this Court and must not become part of Fourth Amendment jurisprudence.

II. COUNSEL'S INEFFECTIVENESS IN FAILING TO RAISE THE MANIFEST VIOLATION OF MR. JACKSON'S FOURTH AMENDMENT RIGHTS EITHER IN THE TRIAL COURT OR IN THE APPEAL AS OF RIGHT IS GOOD CAUSE FOR MR. JACKSON'S FAILURE TO RAISE THIS ISSUE IN A TIMELY MANNER.

Because Petitioner's attorney did not raise the Fourth Amendment issue during the trial or in the appeal as of right, Petitioner must show cause and prejudice for his default. *United States v Frady*, 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816; (1982) *Wainwright v Sykes*, 433 US 72; 97 SCt 2497; 53 LEd2d 594 (1977). Michigan's MCR 6.508(D), set out in full in the Michigan Supreme Court's opinion (App, 3, 7-8), likewise requires a showing of cause and prejudice. This Court has recognized that "[a]ttorney error that constitutes ineffective assistance of counsel is cause" *Coleman v Thompson*, 501 US 722, 754; 111 SCt 2546; 115 LEd 2d 640 (1991). The Michigan Supreme Court has likewise held that ineffective assistance of counsel under the test articulated in *Strickland v Washington*, 466 US 668; 104 SCt 2052; 80 L Ed 2d 674 (1984) will satisfy the cause requirements of MCR 6.508. *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995).

Petitioner's Motion for Relief from Judgment specifically asserted in Headnote VII that ineffective assistance of trial and appellate counsel, who were one and the same, met the cause requirement. The trial court rejected this claim by noting that, since the evidence was properly admitted, "It follows that any neglect of trial or appellate counsel in failing to raise this issue was of no consequence. " Petitioner pursued this claim through the Michigan Court of Appeals and Supreme Court. The Supreme Court likewise declined to reach the cause issue because it had already determined that the taint of the illegal arrest had been purged and so there was no

prejudice in failing to raise the Fourth Amendment claim. On this record, Petitioner has exhausted his claim that his attorney's failure to raise and appeal this issue gives good cause for review of this illegal arrest.

His attorney was in fact ineffective under *Strickland*. The pretrial hearings as to the voluntariness of the confession made a clear record that the arrest was illegal. Even the lower courts conceded, "It was undeniable that the police lacked probable cause to arrest defendant at his home." Therefore, competent counsel, functioning as guaranteed by the Sixth Amendment, certainly would have raised the issue so well established in the record. And, as has been shown herein, if the issue had been raised the Fourth Amendment would have required suppression of the confession and evidence obtained through the consent to search.

Counsel's failure to have this evidence suppressed was also prejudicial. *Strickland* defines prejudice as a reasonable probability, in the absence of counsel's unprofessional errors, that the outcome of the proceedings would have been different. Here, there is a reasonable probability that Petitioner would have been found guilty of a lesser degree of murder if his attorney had the confession suppressed. The record shows that the trial court relied exclusively on the confession to find evidence of premeditation. This raised the conviction from second degree to first degree murder under Michigan law. MCL 750.316. Premeditated murder under this statute carries a mandatory life sentence, without parole. Second degree, on the other hand, can be for any term of years or a life sentence, MCL 750.317, and even a life sentence for second degree murder is parolable after ten years of imprisonment. MCL 791.234(6). The state also relied extensively on the shoes, jeans jacket and blood expert testimony. Finally, there is a fair probability that Petitioner would not have adopted the insanity defense he presented at trial if his confession and the illegally seized

evidence had been suppressed. There is a reasonable probability, then, that the outcome would have been different the absence of counsel's failures.

In sum, this Court should review this issue and grant relief because the ineffective assistance of counsel at trial and on direct appeal provides cause for Petitioner's failure to raise the Fourth Amendment issue at trial or on the appeal as of right, and because the wrongful admission of evidence was highly prejudicial. Finally, Petitioner is time barred from seeking habeas corpus relief because his Motion for Relief from Judgment was filed more than one year from the effective date of 28 USC 2244(D). Therefore, only this Court can correct the mistaken analysis of the lower court.

RELIEF REQUESTED

For all of the reasons stated above, Petitioner requests that this Court issue a writ of certiorari or alternatively remand this matter for further proceedings.

Respectfully submitted,

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231-256-2200

Dated: January 30, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs- File No: 84-05755 FC 1-4

MICHAEL THOMAS JACKSON,

Defendant.

_____/

OPINION AND ORDER OF THE COURT

AT A SESSION OF THE CIRCUIT COURT HELD AT THE COURTHOUSE IN THE CITY AND COUNTY OF SAGINAW, STATE OF MICHIGAN, THIS 12TH DAY OF AUGUST, 1998

PRESENT: THE HONORABLE WILLIAM A CRANE, CIRCUIT JUDGE

Defendant Michael Jackson was convicted on April 18, 1985 of the premeditated first-degree murder of a fourteen year old girl. The conviction was subsequently affirmed by the Court of Appeals on September 7, 1988. He now moves for post-appellate relief pursuant to MCR 6.500, raising essentially four issues.

Counsel for defendant, in Issues I, II and III of his motion and brief, argues that the police lacked probable cause to affect an arrest and that the resulting statements, consent to search and evidentiary fruits of that search were inadmissible at trial. The Court, having reviewed the file in this matter, in particular the testimony of Detective Malczewski at the suppression hearing held on March 25, 26 and 19th, disagrees.

The pertinent facts are as follows:

At some point during the late evening hours of December,13, 1985 or early morning hours of the 14th, the police in the course of their ongoing investigation of an apparent killing that had occurred earlier that day, learned that one Michael Jackson was present at the home of the victim earlier that afternoon. Defendant was acquainted with the victim having known her approximately two or three years, primarily through the relationship that his father had with the victim's mother. Following receipt of this information the police proceeded to defendant's residence, arriving at approximately 2:45 AM. Defendant lived there with father and older brother. At the time, only the defendant and older brother were at the residence. The officers knocked on the door and were permitted entry by the defendant. Following a preliminary determination of and identification of those present, Detective Malczewski asked defendant if he knew the victim, Annessa Smith, to which defendant replied that he did, adding something the effect that he might have seen her. Defendant was then stopped from making any further statements and asked how old he was. Once it was determined that he was sixteen years of age, Detective Malczewski read him his Miranda rights and informed him that he would be taken to the Michigan State Police Post while they attempted to locate his father. They arrived at the post at approximately 3:30 AM. In the meantime, attempts to locate the father proved successful. He was told. his son was at the post and that they wanted to interview him but because of his age they needed a parent to be present. The father arrived shortly thereafter and informed that his son was a possible suspect in killing of Annessa Smith. At no point in this intervening period was

defendant questioned about killing. Following a second reading of the Miranda warnings, both defendant and his father signed an appropriate waiver form. Defendant thereafter gave a statement to the police in the presence of his father. They both also signed a consent form permitting a search of their residence.

The voluntariness of defendant's statement was tested both in the probate court and circuit court pursuant to People v Walker, 374 Mich 331 (1965). On both occasions the issue was decided against the defendant. On appeal, defendant raised for the first time the question of police compliance with the provision JCR 1963. 3.3, asserting that they failed to advise him of right to be taken to a youth detention facility and to have a youth officer present while he made his statement. Defendant further argued that he was exposed to police questioning without the presence of a parent who could adequately protect his interests. The Court of Appeals held that no miscarriage of justice would result from their failure to review defendant's objections the juvenile court rules and went on to state that despite the police's failure to carry out its duties under the probate code, defendant's statement, under the totality of circumste properly admitted.

The question presently before the Court is not whether defendant's confession was involuntary and therefore excludable under the Fifth Amendment or otherwise inadmissible because of some violation of the probate code, but whether it is excludable as the fruit of the poisonous tree of an illegal arrest. A statement which is solely the product of an illegal arrest is inadmissible. Stated differently, the fact that a statement may have been voluntary under the Fifth Amendment does not mean it was obtained and admissible for purposes of the Fourth Amendment. The question to be answered is whether there was a causal connection between the unlawful detention and the statement. A statement of piece of

evidence, however, is not "fruit of the poison tree" simply because it would not have come to light "but for" the illegal actions of the police. The inquiry in each case is whether the evidence gained or statement or consent given was comne at by the exploitation of the primary illegality. Where the connection is attenuated or the initial taint purged, exclusion will not result. The Courts have identified a number of factors which are relevant in this context: (1) the presence of Miranda warnings and the voluntariness of the statement; (2) the lapse of time between the arrest and the statement; (3) any intervening circumstances; (4) any antecedent circumstances; and (5) the purpose and flagrancy of the official misconduct. See Brown v Illinois, 422 US 590; 95 SCT 2254; 45 LED2d 416 (1975); Brown v Illinois, 422 US 590; 95 S Ct 2254; 45 L Ed 2d 416 (1975); Wong Sun v United States, 371 US 471; 83 SCt 407; 9 LED2d 441 (1962); People v Mallory, 421 Mich 2219, 243, fn 8 (1984); People v Martin, 94 Mich App (1980).

The Court, having fully reviewed this matter, finds no error. While it is true that only a short time elapsed between defendant's seizure and statement, he was, during that period, twice advised of his *Miranda* rights. Nor does the Court find the police conduct in this case particularly flagrant or of such character as to justify the remedy sought. It is undeniable the police lacked probable cause to arrest defendant at his residence. They did, however, clearly have a right and need to question him about his presence at the victim's home and any knowledge he may have had of the killing. In this regard, the entire purpose of taking him into custody was not to place him under arrest, but to hold him until he could properly be questioned in the presence of his father. Although there apparently was a failure to comply with all appropriate procedures governing questioning of a minor, the officers were at least aware that different procedures and rules applied and did their best to comply with them. There is nothing in this case to suggest that

their actions were part of some illegal plan or scheme or product of improper motivation. As noted above, no attempt was made to question defendant until his father was present. Mr. Jackson was contacted as soon as possible, arriving at the post a short time after his son. Both of them were given *Miranda* warnings and the defendant made his statement. As noted by the Court of Appeals, there is nothing in the record to suggest that the father was not fully able to exercise his free will and protect the rights and interests of his son. Under the circumstances, the Court finds that any taint of initial police misconduct was sufficiently purged and the statement admissible under the Fourth Amendment. It follows that any neglect of trial or appellate counsel in failing to raise this issue was of no consequence. For the same reasons, it also follows that any consent obtained from the defendant and his father to search the premises in question was voluntary and otherwise proper, and that any evidence seized as the result of that consensual search was properly admitted at trial.

Lastly, defendant argues that the probate court improperly waived jurisdiction to the circuit court and that his substitute trial counsel essentially abandoned an eminently viable issue when he dismissed a timely filed claim of appeal from the probate court decision. The appeal had been filed by defendant's first counsel. An attempt to belatedly raise the question by way of a motion for new trial proved unsuccessful when the trial court refused to consider the issue, holding that the failure to timely appeal the probate court's order waiving jurisdiction precluded consideration. The Court of Appeals similarly refused to address the matter. The ancillary question of whether defendant was denied effective assistance of counsel in this regard is complicated by the fact that appellate counsel and substitute counsel are one in the same.

At present, the Court has before it only the motion and supporting brief of the defendant and cannot, at this

time, say that the issue raised is without merit and that he is plainly not entitled to relief. Accordingly, the Court will order the Office of Saginaw County Prosecutor to file a response within 30 days pursuant to MCR 6.506. That response, in addition to arguing the merits of the probate court action and the adequacy of the representation of trial and appellate counsel, may also address defendant's entitlement to relief pursuant to MCR 508(D). Following receipt of that response, the Court will either enter a further written opinion and order or schedule the matter for oral argument.

IT IS SO ORDERED.

/s William A. Crane
William A. Crane, Circuit Court Judge

Court of Appeals, State of Michigan

ORDER

People of MI v Michael Jackson

Docket No: 225416

LC No: 84-005755-FC

Jane E. Markey
Presiding Judge

Richard A. Bandstra

Janet T. Neff
Judge

The Court orders that the delayed application for leave to appeal is DENIED for failure to meet the burden of establishing entitlement to relief under MCR 6.508.

/s Janet E. Markey
Presiding Judge

SEAL

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

7-18-00
Date

/s Carl L. Gromek
Chief Clerk

Michigan Supreme Court Lansing, Michigan 48909

Opinion

Chief Justice Maura D. Corrigan Justices Michael F. Cavanagh Elizabeth A. Weaver Marilyn Kelly Clifford W. Taylor Robert P. Young, Jr. Stephen J. Markman

FILED SEPTEMBER 25, 2001

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee, v No. 117594
MICHAEL T. JACKSON,
Defendant-Appellant.

PER CURIAM

In 1985 the defendant was found guilty following a bench trial of first-degree murder, and his conviction was affirmed on appeal. In 1998, he filed a motion for relief from judgment under MCR subchapter 6.500. Relief was denied by the circuit court, and the Court of Appeals denied leave to appeal. Defendant has filed an application for leave to appeal to this Court. In addition to arguing the substantive issues, he maintains that the limitations on relief provided by MCR 6.508(D) should not apply to him because his conviction predated the effective date of the rule. He claims that it would constitute a due process violation to apply the rule retroactively to his case.

We conclude that the subchapter 6.500 procedures do apply to convictions before the effective date of the rule and that there is no constitutional impediment to doing so. On the facts of this case, the defendant has not established

entitlement to relief as required by MCR 6.508(D), and the order of the circuit court denying relief is affirmed.

I

On December 13, 1983, a fourteen-year-old girl was beaten to death in her Saginaw County home. Attention focused on the defendant when it was 7learned that he had been there that day. Defendant was then sixteen years old, and thus proceedings began in the probate court. After several days of waiver hearings, the juvenile division of the probate court waived jurisdiction on August 20, 1984, and the defendant was bound over on a charge of first-degree (premeditated) murder.

Defendant waived a jury and presented an insanity defense, making no effort to dispute that he killed the victim. The circuit judge found him guilty as charged on April 18, 1985, and imposed the mandatory life sentence on May 31, 1985. Defendant's motion for a new trial was denied in an opinion issued November 21, 1986. Defendant appealed, but the Court of Appeals affirmed on September 7, 1988.[1] We denied leave to appeal on April 25, 1989.[2] In his direct appeal, among other issues, the defendant raised claims regarding the waiver of jurisdiction by the juvenile division of the probate court and the admissibility of his confession.

In July 1998, the defendant filed a motion for relief from judgment in the Saginaw Circuit Court, once again challenging the waiver of juvenile court jurisdiction and the admissibility of his confession. He also argued that MCR 6.508(D) should not be applied retroactively to his case.

The circuit court's consideration of the motion took place in several stages. First, on August 12, 1998, the

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[1] 171 Mich App 191; 429 NW2d 849 (1988).

[2] 432 Mich 896 (1989).

court[3] issued an opinion and order dealing with the issues regarding admissibility of the defendant's statement. The court noted that the voluntariness of the defendant's statement had been tested in both the juvenile court and the circuit court with evidentiary hearings under *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965), and resolved against the defendant. Further, on his initial appeal, the defendant raised for the first time the question of police compliance with former Juvenile Court Rule 3.3. The Court of Appeals held that no miscarriage of justice would result from failure to review the objections, but went on to say that despite the police failure to carry out their duties under JCR 3.3, defendant's statement was properly admitted under the totality of the circumstances.

Finally, the circuit court addressed the defendant's new claim that the confession was inadmissible as the product of an illegal arrest. The court discussed the issue at length, finding no error. It said:

> While it is true that only a short time elapsed between defendant's seizure and statement, he was, during that period, twice advised of his *Miranda* [4]rights. Nor does the Court find the police conduct in this case particularly flagrant or of such character as to justify the remedy sought. It is undeniable the police lacked probable cause to arrest defendant at his residence. They did, however, clearly have a right and need to question him about his presence at the victim's home and any knowledge he may have had of the killing. In this regard, the entire purpose of taking him into custody was not to place him under arrest, but to

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[3] The circuit judge who presided at trial had retired, and the motion was assigned to his successor

[4] *Miranda v Arizona*, 84 US 436; 86 SCt 1602; 16 LED2d 694 (1966)

hold him until he could properly be questioned in the presence of his father. Although there apparently was a failure to comply with all appropriate procedures governing questioning of a minor, the officers were at least aware that different procedures and rules applied and did their best to comply with them. There is nothing in this case to suggest that their actions were part of some illegal plan or scheme or product of improper motivation. As noted above, no attempt was made to question defendant until his father was present. Mr. Jackson was contacted as soon as possible, arriving at the post a short time after his son. Both of them were given *Miranda* warnings and the defendant made his statement. As noted by the Court of Appeals, there is nothing in the record to suggest that the father was not fully able to exercise his free will and protect the rights and interests of his son. Under the circumstances, the Court finds that any taint of initial police misconduct was sufficiently purged and the statement admissible under the Fourth Amendment. It follows that any neglect of trial or appellate counsel in failing to raise this issue was of no consequence. For the same reasons, it also follows that any consent obtained from the defendant and his father to search the premises in question was voluntary and otherwise proper, and that any evidence seized as the result of that consensual search was properly admitted at trial.

The court then turned to the other issue raised in the motion regarding the juvenile court's waiver of jurisdiction. The circuit court said that from the motion and supporting brief it could not say that the issue raised was without merit and that defendant was plainly not entitled to relief. Accordingly, the court ordered the prosecutor to respond to the motion.

Following the response, the court issued a second opinion and order on May 28, 1999, rejecting the defendant's claim. After reviewing the testimony, as well as the applicable legal principles, the court concluded:

> Having reviewed the testimony presented, this Court is not left with any firm and definite conviction defendant was improperly waived to the adult system. Although there was sufficient indication that Michael was amenable to treatment and that the juvenile system could provide the type of treatment required, the evidence and testimony clearly supports the conclusion that there simply was not enough time to sufficiently resolve the underlying psychological problems that helped trigger this tragic event before Michael reached nineteen and juvenile jurisdiction ended, and that he would likely remain a danger to the public if released at that time. Nor does the Court find, as suggested by defendant, that the Probate Judge ignored key testimony or otherwise misinterpreted the evidence. In this regard, the Court notes that while Michael could have been placed in Yorkwood and then transferred to the adult unit at Ypsilanti State Hospital at age eighteen, there would be no way to ensure continued treatment after age nineteen except through a petition for involuntary commitment and hospitalization. Although Judge Barber made no mention of Yorkwood in his opinion, he apparently found, and this Court agrees, that the scenario envisioned by defendant was neither likely or viable. In summary, the Court finds the decision to waive jurisdiction to be supported by substantial and credible evidence on the record. It follows that any claim of ineffective assistance of counsel must also fall.

Defendant filed a delayed application for leave to appeal. The Court of Appeals denied the application, "for failure to meet the burden of establishing entitlement to relief under MCR 6.508."[5]

II

Subchapter 6.500 of the Michigan Court Rules, containing the procedure for motions for relief from judgment, was added by order of March 30, 1989, and was effective October 1, 1989. It was part of an overall revision of the rules governing criminal procedure. The amendments adopted at that time included several related provisions applicable to criminal appeals, including the addition of MCR 7.205(F)(2), limiting a criminal defendant to a single appeal by right or leave from a conviction, and the amendment of MCR 7.205(F)(3) to make the eighteen-month limit[6] on granting delayed application for leave to appeal applicable to criminal cases.

The rules themselves, and the order adopting them, did not say anything about the applicability of the rules to cases that had already been commenced or cases involving crimes committed before the effective date of the amendments. The general provision of the Michigan Court Rules regarding the application of the rules to pending actions is MCR 1.102, which provides:

> These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice.

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[5] Unpublished order, entered July 18, 2000 (Docket No. 225416)

[6] Since shortened to twelve months

Those principles have been applied not only to the initial adoption of the rules, but also to later adopted or amended rules. See *Reitmeyer v Schultz Equipment & Parts Co*, 237 Mich App 332, 337; 602 NW2d 596 (1999). Subchapter 6.500 has been consistently applied in cases involving convictions and appeals concluded before October 1, 1989, by both this Court and the Court of Appeals. See, e.g., *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995); *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994); *People v Ross*, 242 Mich App 241; 618 NW2d 774 (2000); *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992).[7]

III

MCR 6.508(D) provides the standards for determining whether a defendant is entitled to relief: (D) Entitlement to Relief.

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a

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[7] In addition, we have cited MCR 6.508 in numerous orders denying leave to appeal from denial of motions for relief from judgment. E.g., *People v Davis*, 440 Mich 866; 486 NW2d 722 (1992); *People v Dunham-Bey*, 441 Mich 855; 489 NW2d 766 (1992); *People v Yousif*, 444 Mich 878; 511 NW2d 683 (1993)

on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case; (iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

The requirements of showing good cause for failure to raise the issue on direct appeal and prejudice from the alleged error to entitle a defendant to relief are derived from United State Supreme Court decisions involving federal habeas corpus challenges to state convictions and collateral review of federal ones. See *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977); *United States v Frady*, 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982); *Davis v United States*, 411 US 233; 93 S Ct 1577; 36 L Ed 2d

216 (1973). The provision of subrule (D)(2) regarding issues that were decided against the defendant in a prior appeal state familiar principles drawn from the doctrines of res judicata and law of the case.

Before the adoption of subchapter 6.500 and the related appellate procedure provisions, our rules were silent on the matter of delayed motions for new trial. We had said that the courts do not look with favor on such long delayed motions, *People v Barrows*, 358 Mich 267, 272; 99 NW2d 347 (1959), but there was no bar to repeated filings of such motions without any limitation period. *Id.*, p 273; *Reed, supra* at 388.[8]

IV

The defendant makes no claim that on their face the provisions of subrule (D)(3) are unconstitutional. Such a claim would be futile in light of the United States Supreme Court's recognition of those standards. Rather, the defendant argues that it constitutes a denial of due process to apply MCR 6.508 to him, because his crime, conviction, and direct appeal occurred before the effective date of the rule. He relies principally on *Rogers v Howes*, 144 F3d 990 (CA 6, 1998).

Rogers was a habeas corpus proceeding under 28 USC 2254. The defendant had been convicted of first-degree murder in 1965. In 1992, he filed a motion for relief from judgment, which the trial court denied on the ground that the defendant failed to raise the claims on direct appeal and did not establish good cause for the failure to do so. The defendant filed a habeas corpus petition in United States District Court, which held that because the issues raised were procedurally defaulted under Michigan law, it could not review the claims. However, the United States Court of Appeals for the Sixth Circuit reversed,

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[8] We reiterate the principle stated in *Barrows* that longdelayed motions seeking relief from convictions are disfavored. See *People v Ward*, 459 Mich 602, 611-614; 594 NW2d 47 (1999).

concluding that the MCR 6.508(D)(3) procedure was not "a firmly established and regularly followed rule of the Michigan courts at the time of petitioner's conviction . . . ." *Id.* at 995. Thus, it did not constitute "an adequate and independent state ground" barring review of petitioner's habeas petition in federal 11 court. *Id.*

Defendant's reliance on *Rogers* is misplaced. *Rogers* did not hold that the defendant is denied due process by application of MCR 6.508(D)(3) to his motion. Rather, *Rogers* must be understood in the context of federal habeas corpus review of state court convictions. The federal courts will not review a habeas corpus petition where the state prisoner has not first presented his federal claims to the state courts and exhausted all state court remedies available. See, e.g., *Rust v Zent*, 17 F3d 155, 160 (CA 6, 1994). Further, when a habeas corpus petitioner is denied the opportunity to present a federal claim in state court because of failure to comply with state procedural rules, that decision may preclude habeas corpus review where the state procedural rule constitutes an "independent and adequate state procedural ground" for the decision. *Wainwright, supra* at 87. Under federal law, a procedural bar does not operate to preclude federal habeas corpus review unless it is (1) independent of the federal claim at issue, (2) serves as an adequate basis for barring review, and (3) was "firmly established and regularly followed" at the time to which the rule is to be applied. See *Ford v Georgia*, 498 US 411, 424; 111 S Ct 850; 112 L Ed 2d 935 (1991). In *Rogers*, the Sixth Circuit concluded that MCR 6.508 was not such a firmly established and regularly followed rule at the time of the petitioner's conviction and appeal, and 12 thus the federal court was not barred from considering the habeas corpus petition.

Thus, viewed in context, *Rogers* does not constitute authority that Michigan courts may not apply MCR 6.508(D) retroactively, but only that our decision to do so

will not restrict the federal courts in exercise of their authority under 28 USC 2254.

V

That leaves the question whether application of MCR subchapter 6.500 to the defendant's conviction denies due process. The principles are similar to those regarding retroactive application of statutes that are alleged to impair vested rights. In general, an act relating to remedies or modes of procedure may be given retroactive effect. As we said in *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 572; 331 NW2d 456 (1982):

> Retrospective application of a law is improper where the law "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past". *Hughes* [*v Judges' Retirement Bd*, 407 Mich 75, 85; 282 NW2d 160 (1979)]. "Statutes related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing will, in the absence of language clearly showing a contrary intention, be held to operate retrospectively and apply to all actions accrued, pending or future, there being no vested right to keep a statutory procedural law unchanged and free 13 from amendment." [Quoting *Hansen-Snyder Co v General Motors Corp*, 371 Mich 480; 124 NW2d 286 (1963) (headnote no. 1).]

See also *Romein v General Motors Corp*, 436 Mich 515, 531; 462 NW2d 555 (1990), aff'd 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

On the related question whether retroactive procedural statutes violate the constitutional prohibition on ex post facto laws, we have explained that not every

enactment that works to the detriment of a party constitutes such a violation. See *People v Russo*, 439 Mich 584, 592-593; 487 NW2d 698 (1992):

> The United States Supreme Court has consistently held that the Ex Post Facto Clause, US Const, art I, § 10, cl 1, was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit legislative control of remedies and procedure that do not affect matters of substance. In *Dobbert v Florida*, 432 US 282, 292-293; 97 S Ct 2290; 53 L Ed 2d 344 (1977), the Court stated: "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. * * * "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. For example, in *Hopt v Utah*, 110 US 574 [4 S Ct 202; 28 L Ed 262] (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. *Id.* at 589." An

> enactment will not escape a court's scrutiny under the Ex Post Facto Clause merely because a legislature has given it a procedural label. However, legislation will not be found violative of the clause simply because it works to the disadvantage of the defendant.[9]

We can discern no theory upon which the defendant can be said to have a vested right in the procedures—or lack thereof—for bringing long delayed challenges to criminal convictions extant before the adoption of MCR subchapter 6.500. In 1989, the defendant had been convicted, that judgment had been affirmed by the Court of Appeals, and we denied leave to appeal. At that point, the judgment was final. The defendant had no due process or other constitutional right to further review of his convictions. See *Pennsylvania v Finley*, 481 US 551, 556-557; 107 S Ct 1990; 95 L Ed 2d 539 (1987); *McKane v Durston*, 153 US 684, 687-688; 14 S Ct 913; 38 L Ed 867 (1894). There being no vested right in such procedures, there is no due process impediment to subjecting the defendant to the new subchapter 6.500 procedure.

The federal courts have faced similar questions regarding the limitations on second or successive petitions recently adopted as part of the Antiterrorism and Effective Death Penalty Act. PL 104-132, 110 Stat 1214 (1996). Those restrictions have been applied even where the petitioner's first petition preceded the effective date of the statute. See, e.g., *Pratt v United States*, 129 F3d 54, 58 (CA 1, 1997):

> The filing dates of Pratt's two section 2255 petitions straddle AEDPA's effective date. On this basis, Pratt maintains that the question whether the statute applies to his second petition must be

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[9] For a similar analysis of the retroactive effect of the new federal limits on habeas corpus relief, see *Libby v Magnusson*, 177 F3d 43, 46-47 (CA 1, 1999).

answered in the negative because doing so would place an impermissible retroactive burden on his petition. We disagree. We begin our analysis by remarking the obvious: applying a statute to a pleading that was filed after the statute's effective date is not really a "retroactive" application in the classic sense. Here, moreover, we know on the best of authority that Congress intended that AEDPA apply to all section 2255 petitions filed after its effective date (April 24, 1996). See *Lindh v Murphy*, 521 US 320, 325-326; 117 S Ct 2059; 138 L Ed 2d 481 (1997). We know, too, that the Supreme Court recently and uncritically applied AEDPA to a prisoner's second habeas petition even though the prisoner had filed his first petition prior to AEDPA's enactment. See *Felker* [*v Turpin*, 518 US 651, 656- 657; 116 S Ct 2333; 135 L Ed 2d 827 (1996)]. Several courts of appeals have followed suit. See, e.g., *In re Medina*, 109 F3d 1556, 1561-62 (CA 11, 1997); *Roldan v United States*, 96 F3d 1013, 1014 (CA 7, 1996); *Hatch v Oklahoma*, 92 F3d 1012, 1014 (CA 10, 1996). This approach is sound not only from a legal perspective but also from the standpoint of common sense. After all, if pre-AEDPA jurisprudence somehow attached to an entire course of post-conviction proceedings by virtue of a prisoner's having filed a pre-enactment petition at some point along the way, then the Court's opinion in *Felker* would be drained of all meaning.

VI

Defendant also maintains that, concerning his claim regarding improper waiver of jurisdiction by the juvenile division of the probate court, he is not required to show good cause for failure to raise the matter on appeal or actual prejudice. MCR 6.508(D)(3) expressly excepts "jurisdictional defects." He maintains that the circuit court

never properly obtained subject matter jurisdiction, entitling him to review of the issue.

Regardless of whether this claim is a jurisdictional one within the meaning of MCR 6.508(D)(3), the defendant is not entitled to relief. Pursuant to MCR 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of that issue by the operation of subrule (D)(3).[10]

VII

In addition to his arguments regarding the applicability of MCR 6.508, the defendant argues that he had shown good cause for failing to raise the issues in his appeal of right because of prior counsel's ineffectiveness in dismissing the juvenile waiver appeal and in failing to raise the police violation of JCR 3.3. As noted earlier, the circuit judge carefully reviewed and discussed the merits of these claims, finding them without merit. This, in effect, amounts to a determination that defendant failed to establish the prejudice aspect of the MCR 6.508(D)(3) standard. That made it unnecessary for the court to address the good cause question. See *Reed, supra* at 400-401.

We find no error in the judge's analysis of the prejudice question and therefore affirm.

CORRIGAN, C.J., and CAVANAGH, WEAVER, KELLY, TAYLOR, YOUNG, and MARKMAN, JJ., concurred.

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[10] Nor does the Court of Appeals citation of the court rule indicate otherwise. The Court of Appeals cited MCR 6.508(D), of which subrule (3) is only a part. The Court of Appeals order cited the rule in the context of its statement that the defendant had not met his burden, and did not refer to this as a failure to establish good cause or prejudice.

ORDER Michigan Supreme Court
Entered: November 8, 2001-

Rehearing No. 467
117594
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

V SC: 117594
COA: 225416
MICHAEL T. JACKSON, Saginaw CC: 84-5755

In this cause a motion for rehearing is considered and, in lieu of granting rehearing, we amend the opinion of September 25, 2001 as follows: Footnote 10 of the opinion is DELETED. In all other respects, rehearing is DENIED.

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 8, 2001 s/Corbin R. Davis

PEOPLE V JACKSON
Docket number: 86292
Decided September 7, 1988

Before: SHEPHERD, P.J. and WAHLS and G. B. FORD, JJ.

G.B. For, J. Defendant appeals as of right from his April 18, 1985, conviction in Saginaw Circuit Court of premeditated first-degree murder, MCL 750.316; MSA 28.548. We affirm.

The incident leading to defendant's conviction was the December 13, 1983, beating death of a fourteen-year-old girl. Defendant, who was sixteen years old at the time of the incident, became acquainted with the victim two or three years prior to it because his father was dating the victim's mother. A friend of the victim testified at trial that the victim did not like defendant, and teased him by calling him "pizza face."

One of the victim's neighbors testified that, at approximately 2:30 P.M. on the date of the murder, she saw defendant park his truck some distance away from the victim's home and proceed through some nearby woods. The victim's friend testified that she was on the telephone with the victim at approximately 2:50 P.M. on the same day, and heard the victim speak with defendant. The victim asked defendant how he had come to her house, as she did not see his car anywhere. The friend heard defendant reply that his car was parked on the other side of the victim's driveway.

In a December 14, 1983, statement to the police, which was admitted at trial, defendant said that he drove his brother's truck to the vicinity of the victim's house on the day of the murder and parked it some distance away. Upon reaching the victim's house, he entered the garage, picked up a wrench, and knocked on the door. Seeing that the victim was on the telephone, defendant waited until

she had completed the call before hitting her on the head with the wrench. He then returned to the garage and got a piece of firewood, with which he also struck the victim. Defendant told the police that he wanted to hit the victim because she called him names.

A pathologist who examined the victim testified that her death was caused by trauma to the skull and brain. He found bruises and lacerations on her face, hands, wrists and back. The injuries were consistent with those administered by a fist, a steel ratchet and a piece of firewood. The injuries had not all been administered at the same time; the blows to the head and face were administered a little more than an hour apart.

Defendant was arrested some time after midnight in the early morning of December 14, 1983, and taken to the state police headquarters in Bridgeport, Michigan. The police also summoned defendant's father, who was located with the victim's family members. Defendant's statement was taken after he and his father signed waivers of their rights under Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Probate court jurisdiction over defendant was waived to the circuit court by order dated August 20, 1984. On August 31, 1984, defendant filed an appeal from that order. In January, 1985, defendant obtained a new attorney. At a February 14, 1985, hearing in the circuit court, defendant's new attorney stated that the appeal from the order waiving jurisdiction would not be pursued. The appeal was dismissed by order dated March 8, 1985.

On December 17, 1984, defendant filed notice that he intended to assert the defense of insanity. This necessitated adjournment of the trial scheduled January 23, 1985, so that psychiatric examinations could be completed. The trial scheduled March 12, 1985, was continued by stipulation due to the unavailability of one of defendant's expert witnesses, and so that the parties could obtain reports from the Forensic Center. A bench trial was held in

April, 1985. Following his conviction, defendant was sentenced to mandatory life imprisonment. This appeal was taken from the circuit court's December 2, 1986, order denying defendant's motion for a new trial.

Defendant first asserts that the probate court improperly waived jurisdiction over him. In denying defendant's motion for a new trial, the circuit court refused to consider this issue, holding that defendant had waived it because he did not timely appeal the probate court's order waiving jurisdiction.

This Court will not rule on the propriety of a waiver of jurisdiction by the probate court unless the juvenile first seeks review in the circuit court. The review procedure is governed by the statutes and court rules pertaining to appeals. People v Mahone, 75 Mich App 407, 410; 254 NW2d 907 (1977).

GCR 1963, 701.2(a), now MCR 7.101(B)(1), provided for an appeal as of right to the circuit court from a probate court order if appeal was taken within twenty days of the entry date of the order (twenty-one days under the new rule). Where the twenty-day period had expired, the circuit court could grant leave to appeal if requested pursuant to GCR 1963, 701.2(c), 703.2, now MCR 7.101(B)(2), 7.103(B).

Here, defendant appealed from the probate court's August 20, 1984, order waiving jurisdiction within the twenty-day time limitation of former GCR 1963, 701.2(a). However, defendant subsequently abandoned the appeal, which has been dismissed. Moreover, defendant never sought leave to appeal in the circuit court. Because no appeal has been pursued in the circuit court, this Court may not consider the propriety of the probate court's order waiving jurisdiction. 1

Defendant next contends that his December 14, 1983, statement to the police should not have been admitted into evidence at trial. Defendant asserts that the police failed to comply with the provisions of JCR 1969,

3.3, in that they failed to advise him of his right to be taken to a youth-detention facility and to have a youth officer present while he made his statement. Defendant further protests that he was exposed to police questioning without the presence of a parent who could adequately protect his interest. Defendant claims that his father's connection with the victim's family rendered him unable to act as advocate for his son.

The voluntariness of defendant's statement was tested by the probate court, which held a hearing pursuant to People v Walker (On Rehearing), 374 Mich 331; 132 NW2d 87 (1965), during the waiver proceedings. A Walker hearing was also held in the circuit court. The question of police compliance with JCR 1969, 3.3 is raised for the first time on appeal, however.

Issues not raised in the trial court are not preserved for appeal unless failure to review would result in a miscarriage of justice. People v Snow, 386 Mich 586, 591; 194 NW2d 314 (1972). We are not convinced that a miscarriage of justice would result from our failure to review defendant's objections based on JCR 1969, 3.3.

Under People v Irby, 129 Mich App 306, 316; 342 NW2d 303 (1983), lv den 418 Mich 951 (1984), the admissibility of a juvenile's confession is determined by looking to the totality of the surrounding circumstances. Factors to be considered are (1) whether the requirements of Miranda v Arizona, supra, have been met, (2) the degree of police compliance with the safeguards mandated by the juvenile court rules, (3) the presence of an adult custodian or parent, and (4) the juvenile's personal background. Here, the record reflects that the police were remiss in carrying out their duty to inform defendant of his rights as a juvenile. It also reflects that defendant has dull normal intelligence, with an IQ score of 88. However, defendant and his father were both adequately informed of their Miranda rights, and both clearly understood and waived them. Moreover, defendant was not questioned about the

facts surrounding the killing until his father was present. There is no indication in the transcript of the police interview with defendant and his father, which includes the Miranda warnings, that defendant's father was unable to exercise his free will or protect defendant's rights. We find under the totality of the circumstances that defendant's statement to the police was not coerced, and that it was properly admissible at trial.

Defendant further asserts that the circuit court did not adequately state findings of fact and conclusions of law in support of his conviction as required by MCR 2.517. Specifically, defendant challenges the court's findings with respect to intent, premeditation and insanity.

In People v Jackson, 390 Mich 621, 627; 212 NW2d 918 (1973), our Supreme Court held that in a criminal case a judge sitting without a jury must articulate findings of fact as well as conclusions of law to ensure that the law has been correctly applied to the facts. There has been disagreement among several panels of this Court as to the degree of specificity necessary to satisfy MCR 2.517. In People v Davis, 126 Mich App 66; 337 NW2d 315 (1983), one panel held that specific findings of fact on each element of the crime are necessary to satisfy the rule. In People v Taylor, 133 Mich App 762; 350 NW2d 318 (1984), rev'd and remanded on other grounds 422 Mich 554, 568; 375 NW2d 1 (1985), another panel held that the rule's requirements are met as long as it appears from the court's findings that the court was aware of the issues in the case and correctly applied the law. We note the trend in more recent cases is to follow the rule of Taylor. See, e.g., People v Eggleston, 149 Mich App 665, 671; 386 NW2d 637 (1986), lv den 426 Mich 862 (1986); People v Melvin Davis, 146 Mich App 537, 551; 381 NW2d 759 (1985); People v Robinson, 145 Mich App 562; 378 NW2d 551 (1985); People v Fair, 165 Mich App 294, 298; 418 NW2d 438 (1987); People v Daniels, 163 Mich App 703; 415 NW2d 282 (1987).

Here, the circuit court's findings of fact and conclusions of law with respect to the issues of intent and premeditation are set forth with such specificity as to satisfy the stricter standard set forth in People v Davis, supra. Accordingly, the findings on these issues form no basis for reversal.

The court's findings of fact and conclusions of law regarding insanity do not meet the stricter Davis standard; however, they are sufficient under People v Taylor, supra. On this basis, we will uphold the court's findings with respect to insanity. The court's findings show the trial judge's awareness of the insanity issue and his resolution of it; moreover, appellate review would not be facilitated by further explication. People v Jackson, supra, p 627, n 3.

Defendant also urges this Court to find that the great weight of the evidence does not establish the element of premeditation. Reversal on this basis is warranted only if the circuit court abused its discretion in denying defendant's motion for a new trial. We will not substitute our judgment for the factfinder's, but will reverse only if the evidence cannot support a finding of guilt beyond a reasonable doubt. People v Turner, 62 Mich App 467, 470; 233 NW2d 617 (1975); People v Whalen, 129 Mich App 732, 745; 342 NW2d 917 (1983).

Premeditation may be inferred from (1) the weapons used in a killing, (2) the location of the wounds inflicted, (3) the circumstances surrounding a killing, (4) the previous relationship between the killer and victim, and (5) the killer's actions before and after the crime. People v Kvam, 160 Mich App 189, 193; 408 NW2d 71 (1987). Here, defendant knew the victim for two or three years prior to the killing and did not get along with her because she called him names. He parked his truck a distance away from the victim's home on the date of the killing, from which the trial court could infer that he did not wish to be seen there that day. Defendant picked up a tool used in the killing before entering the victim's house,

and waited to strike her until she had finished a telephone conversation. Having hit her with the tool, he returned to her garage for a bigger weapon, with which he attacked her a second time. Four of five psychotherapists who interviewed defendant after the killing testified at trial that defendant did not meet the statutory criteria for insanity, and that he knew what he was going to do to the victim before he went to her house. Given the foregoing facts, the evidence supports the judge's finding that the killing was premeditated. 3

Defendant's final contention on appeal is that he was denied his right to a speedy trial under Const 1963, art 1, § 20.

The factors which must be balanced in determining whether defendant was denied his constitutional right to a speedy trial are (1) the length of the delay, (2) the reason for the delay, (3) whether defendant asserted his right to a speedy trial, and (4) prejudice to defendant resulting from the delay.People v Lowenstein, 118 Mich App 475, 487; 325 NW2d 462 (1982), lv den 414 Mich 947 (1982).

Here, defendant was tried approximately sixteen months after his arrest and incarceration on December 14, 1983. He asserted his right to a speedy trial October 3, 1984. The delay was caused by the April, 1984, waiver proceedings, and defendant's assertion of the insanity defense December 17, 1984. The assertion of the insanity defense necessitated postponement of trial from January to April, 1985, so that evidence pertinent to the defense could be obtained. We find no prejudice resulting from the delay, because it was necessary to protect defendant's rights as a juvenile and to adequately present his defense of insanity. Defendant's assertion that the delay caused him anxiety is, by itself, insufficient to establish a violation of his right to a speedy trial. People v White, 54 Mich App 342, 352; 220 NW2d 789 (1974), lv den 397 Mich 805 (1976).

Affirmed.

1 Defendant cites People v Billington, 116 Mich App 220, 230; 323 NW2d 343 (1982), for the proposition that the time limit for appeals from probate court should not be applied to the instant circumstances. In Billington, defendant challenged the probate court's waiver of jurisdiction in this Court without first having raised it in the circuit court. This Court refused to consider the issue because it had not been raised in the circuit court, noting in dictum that defendant had two opportunities to challenge the waiver of jurisdiction at two trials in his case. We note that the issue of timeliness under the court rules governing appellate proceedings was not before the panel in Billington, and disagree with that opinion insofar as it implies that the time limits set forth in the court rules do not apply in cases involving waiver of jurisdiction from probate court. We agree with the panel in People v Mahone, supra, that requiring compliance with the time limits imposed in the court rules will facilitate the speedy resolution of the jurisdictional issue in serious crimes involving juveniles.

2 We further note that two of the panel members in People v Davis have subsequently repudiated its holding. People v Fair, supra, p 298, n 1.

3 We find no merit in defendant's contention that the circuit court took an insufficient amount of time to review the evidence before announcing its finding of guilt. Because the evidence overwhelmingly substantiated the court's finding, lengthy deliberations were unnecessary.